BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAISY V. TELLINGTON	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,062,753
	)	& 1,062,754
GENERAL MOTORS, LLC	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the January 2, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Zachary A. Kolich of Shawnee Mission, Kansas, appeared for claimant. Elizabeth R. Dotson of Kansas City, Kansas, appeared for respondent. ALJ Hursh's Order was issued in both claims, but claimant's Application for Review only contains Docket No. 1,062,753. In such instances, the Board has considered the Application for Review an appeal of the ALJ's Order in both claims.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 2, 2013, preliminary hearing and exhibits thereto; the transcript of the November 28, 2012, preliminary hearing and exhibit thereto; and all pleadings contained in the administrative file.

ISSUES

In Docket No. 1,062,753, claimant alleged that she sustained bilateral carpal tunnel syndrome/compressive median neuropathy from repetitive work activities. She asserted the date of injury by repetitive trauma was August 10, 2011. In Docket No. 1,062,754, claimant alleged that as a result of a steering wheel gauge falling on her arm at work on August 10, 2011, she sustained a traumatic right wrist volar ganglion cyst.

At the January 2, 2013, preliminary hearing, ALJ Hursh stated, "The issue today is on medical treatment and payment of unauthorized medical expense for an alleged injury to the bilateral upper extremities, either a repetitive injury or traumatic injury, which have

been pled alternatively."[1] ALJ Hursh found the date of injury for claimant's alleged injury by repetitive trauma in Docket No. 1,062,753 was November 13, 2012, the date of Dr. Edward J. Prostic's causation opinion and that claimant gave timely notice. ALJ Hursh concluded that in Docket No. 1,062,754, claimant's date of accident was August 10, 2011, and she gave timely notice. ALJ Hursh ordered that respondent designate a physician to provide treatment for claimant's ganglion cyst and reimburse claimant $500 for unauthorized medical expense incurred for the services of Dr. Prostic. However, ALJ Hursh found claimant failed to prove by a preponderance of the evidence that "claimant injured her upper extremities by repetitive job duties while employed by the respondent in Kansas."[2]

Docket No. 1,062,753

Claimant appealed, and asserted she sustained a work-related injury by repetitive trauma arising out of and in the course of her employment with respondent. Claimant also asserts the ALJ erred in denying her request for medical treatment. Claimant did not dispute the ALJ's finding that her date of injury was November 13, 2012.

Respondent asserts that in Docket No. 1,062,753, claimant's date of accident was in 2009 in Tennessee, not November 13, 2012, in Kansas. Therefore, Kansas has no jurisdiction over the claim in Docket No. 1,062,753. Respondent contends that claimant failed to prove that she suffered injury by repetitive trauma. Finally, respondent argues that claimant's injury is not compensable because her current injury is an aggravation of a preexisting condition.

Docket No. 1,062,754

In their briefs, neither party addressed the ALJ's findings that claimant, on August 10, 2011, sustained a work-related accident arising out of and in the course of her employment with respondent or that claimant's August 10, 2011, accident was the prevailing factor causing claimant's ganglion cyst. Respondent did not contest ALJ Hursh's rulings that respondent designate a physician to provide treatment for claimant's ganglion cyst and that respondent reimburse claimant $500 in unauthorized medical expenses for the services of Dr. Prostic. Therefore, this Board Member will not review the ALJ's findings in Docket No. 1,062,754.

The issues before the Board are:

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[1] P.H. Trans. (Jan. 2, 2013) at 3.

[2] ALJ Order at 2.

1. In Docket No. 1,062,753, what is claimant's date of injury by repetitive trauma or date of accident?

2. In Docket No. 1,062,753, if Kansas has jurisdiction, did claimant prove by a preponderance of the evidence that her injury by repetitive trauma arose out of and in the course of her employment?

3. In Docket No. 1,062,753, were claimant's injuries an aggravation of preexisting medical conditions?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant has been employed by respondent since 1985. On December 7, 2009, claimant transferred from respondent's plant in Tennessee to respondent's Fairfax plant in Kansas City, Kansas. At the January 2, 2013, preliminary hearing, claimant testified that from December 7, 2009, until three months prior to the preliminary hearing she performed a drive-off job. That job required her to get into a new automobile and drive it to a tow-in pit, where she would insert a steering wheel gauge into the steering wheel. Claimant would then lift the hood and use a tool to focus the headlights. Adjusting the headlights required claimant to use a tool similar to an Allen wrench. Claimant would have to turn the wrench 25 to 30 times to adjust each headlight. She would use the wrench with both hands. During each shift claimant would adjust the headlights on 150 automobiles.

Claimant testified that two months after her transfer to Kansas, she began noticing symptoms of pain and soreness in her hands. On August 10, 2011, a steering wheel gauge fell on claimant's right wrist, and she was sent to plant medical, where she was provided ice and a padded brace. Claimant also saw the plant doctor for the right wrist injury. On cross-examination, claimant acknowledged that she goes to plant medical fairly regularly to have her blood pressure checked, but the first time she complained of hand symptoms was in August 2011. Claimant testified that in September 2012, she returned to Dr. Jesse W. Cheng, the plant doctor, because the cyst she developed in her wrist was swelling. Claimant indicated she also complained of having symptoms of numbness and tingling, awakening at night and that she was dropping items.

While working for respondent in Tennessee in 2009, claimant also had numbness and tingling in her hands. In Tennessee, claimant's job was to use an automatic gun shooting screws to install glove boxes and radios. After transferring out of the job shooting screws, claimant's symptoms went away. Claimant's hands were not bothering her when she transferred to Kansas in December 2009.

Dr. Bruce S. Rubinowicz wrote a June 3, 2009, letter to Joe Shaw, a physician's assistant at Saturn Corporation. Dr. Rubinowicz had evaluated claimant's right upper extremity. Claimant complained of tingling and numbness in her right hand and difficulties in the left upper extremity. Claimant attributed her symptoms to use of a power gun at work. The letter indicated a right EMG was performed and that Dr. Rubinowicz suspected claimant might have mild underlying compressive median neuropathy/carpal tunnel syndrome. Dr. Rubinowicz's June 3, 2009, letter does not indicate he told claimant her right wrist condition was work related, that he took claimant off work or gave her any restrictions. Claimant was not asked by either counsel if Dr. Rubinowicz told her that the hand/wrist symptoms were work related.

Medical records from respondent's Fairfax plant indicated that from August 10, 2011, through October 2, 2012, claimant saw Dr. Jesse W. Cheng, Dr. Frederick A. Buck and several nurses for her right wrist injury. On September 28, 2012, Dr. Cheng indicated claimant had a right wrist ganglion cyst and right carpal tunnel syndrome symptoms. Claimant's left upper extremity was not mentioned in any of Dr. Cheng's notes. Dr. Cheng recommended claimant undergo an EMG/NCV of the right wrist. A note dated September 28, 2012, by nurse Kathy J. Conley indicated claimant was referred to Dr. Fishman for an EMG/NCV. A note by Ms. Conley on October 2, 2012, indicated the EMG with Dr. Fishman was cancelled. A note dated October 2, 2012, from nurse Shenida L. Reed-Drew stated that claimant called and asked why the appointment with Dr. Fishman was cancelled, and claimant was told that she should have received a letter in August 2011 denying the workers compensation claim.

Claimant, at the request of her attorney, was evaluated by Dr. Edward J. Prostic on November 13, 2012. The history obtained by Dr. Prostic indicated that claimant had repetitious trauma to her hands from assembling steering wheels. He also noted claimant had a specific injury on August 10, 2011, when a steering wheel lever fell on her right wrist.

Dr. Prostic performed a physical examination of claimant and noted that claimant had a tissue mass adjacent to the tendon of the flexor carpi radialis at the right wrist. The physical examination also revealed: (1) no heat, swelling, erythema, or atrophy otherwise; (2) range of motion and stability of joints were within normal limits; (3) provocative testing for cubital tunnel syndrome was negative bilaterally; (4) the Tinel test was negative at both wrists; (5) flexion compression median nerve testing was rapidly positive at both hands; (6) pinch strength was satisfactory; (7) maximum grip was 21 kg. on the right compared to 20 on the left and (8) two-point sensory discrimination was somewhat decreased in both the median and ulnar nerve distribution of both hands. Dr. Prostic opined that claimant sustained repetitious trauma to her upper extremities with development of bilateral peripheral nerve entrapment. He also indicated claimant's repetitive trauma while working for respondent was the prevailing factor in causing her injury, medical condition and need for medical treatment.

Respondent had claimant evaluated by Dr. Chris D. Fevurly on December 10, 2012. Dr. Fevurly's report indicated claimant had a previous injury at respondent in the late 2000s, when claimant experienced tingling and numbness into her right hand while working in Tennessee. Claimant reported that her symptoms improved before leaving Tennessee as she took another position with respondent that required no tools. The history obtained by Dr. Fevurly indicated claimant's arm symptoms resolved before her transfer to Kansas.

Dr. Fevurly's physical examination of claimant revealed: (1) a positive Hoffman's sign in both upper extremities; (2) a positive Phalen's and Reverse Phalen's test bilaterally; (3) a positive Tinel's with percussion of the median nerve at the wrist; (4) the Tinel's over the ulnar nerve was normal; and (5) grip strength of 32 kg. bilaterally.

Dr. Fevurly's diagnoses were: (1) right wrist volar radial ganglion cyst and bilateral carpal tunnel symptoms, right greater than left; (2) hyperreflexia and positive Hoffman's test consistent with possible cervical cord impingement; (3) prior right shoulder injury and (4) obesity. Dr. Fevurly recommended claimant undergo a ganglion cyst resection and a repeat EMG/NCV of the bilateral upper extremities. With regard to causation, Dr. Fevurly stated:

> A review of the scientific literature reveals insufficient evidence for establishment of causation between repetitious activity alone as the cause of either ganglion cysts or carpal tunnel syndrome. The combination of force and repetition or force and awkward posture are risk factors for carpal tunnel syndrome but not for ganglion cysts. There is mild support for blunt trauma as the cause of ganglion cysts but the reports from the medical department support that this mass existed prior to the blunt trauma of 8/10/11.[3]

Attached to Dr. Fevurly's report is an article from the May/June 2009 issue of the American Medical Association Guides Newsletter entitled "Carpal Tunnel Syndrome – Occupationally Related or Not?" by Craig Uejo, MD, MPH.

ALJ Hursh noted that Dr. Fevurly's opinion that repetitive work activities did not cause claimant's nerve entrapment came from scientific literature concluding that most cases of carpal tunnel syndrome previously labeled as occupationally related were neither caused nor aggravated by work. ALJ Hursh also believed that Dr. Fevurly had a better grasp of claimant's work activities and that it was not clear whether Dr. Prostic fully understood claimant's job duties. According to ALJ Hursh, the repetitive aspects of claimant's job were mild and not prolonged.

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[3] P.H. Trans. (Jan. 2, 2013), Resp. Ex. C.

PRINCIPLES OF LAW AND ANALYSIS

Respondent asserts claimant's date of injury by repetitive trauma was sometime in 2009, when Dr. Rubinowicz allegedly told claimant her right wrist injury was work related. K.S.A. 2009 Supp. 44-508(d) states that in cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. If the worker is not taken off work or restricted as above described, then the date of injury is the earliest of the following dates: (1) the date upon which the employee gives written notice to the employer of the injury or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. There was insufficient evidence presented by respondent to show that Dr. Rubinowicz communicated to claimant in writing that her right wrist symptoms were work related. Claimant was not taken off work in 2009 nor given restrictions by a physician. While working for respondent in Tennessee, claimant gave respondent no written notice of an upper extremity injury.

In 2011, the Kansas Legislature amended K.S.A. 44-508 so that an accident by repetitive trauma is now considered an injury by repetitive trauma. An injury by repetitive trauma is determined by K.S.A. 2012 Supp. 44-508(e), which states, in part:

> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
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> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.

ALJ Hursh correctly applied K.S.A. 2011 Supp. 44-508(e) to this claim and found claimant's date of injury was November 13, 2012. Prior to that date, claimant was still employed by respondent and was not taken off work nor given any restrictions.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[5]

This Board Member finds that claimant proved by a preponderance of the evidence that in Docket No. 1,062,753 claimant sustained bilateral upper extremity injuries by repetitive trauma arising out of and in the course of her employment with respondent. In June 2009, Dr. Rubinowicz suspected claimant had mild underlying compressive median neuropathy/carpal tunnel syndrome in the right wrist. Dr. Cheng, on September 28, 2012, diagnosed claimant with right carpal tunnel syndrome symptoms. Dr. Prostic diagnosed claimant with bilateral upper extremity peripheral nerve entrapment and Dr. Fevurly opined claimant had bilateral carpal tunnel symptoms. Claimant attributed her upper extremity injuries to her work activities at respondent.

Drs. Fevurly and Prostic differed on the issue of causation and ALJ Hursh relied on Dr. Fevurly's opinion for reasons set out above. This Board Member finds the causation opinion of Dr. Prostic and the testimony of claimant more persuasive than the causation opinion of Dr. Fevurly. The basis of Dr. Fevurly's causation opinion was a scientific article that states, "When is CTS work-related? The medical literature supports a causal connection in a relatively small number of jobs, primarily those involving high force *and* repetition (not just one or the other)."[6] Claimant's work activities required her to use force to place a steering wheel gauge into a steering wheel 150 times a day. She would then open 150 automobile hoods per day. Claimant would then use her hands and wrists to apply force to a tool 25 to 30 times to adjust each headlight (2 headlights per automobile) on 150 automobiles per day. That means she used the tool with her upper extremities 7,500 to 9,000 times per day. Unlike ALJ Hursh, this Board Member finds that claimant's repetitive activities were prolonged, required repeated application of force, and cannot be accurately described as mild.

Respondent next argues that claimant sustained work-related bilateral upper extremity injuries in 2009, and her current injuries are merely an aggravation of those 2009 injuries. This Board Member disagrees. Claimant was given no restrictions in 2009, continued to work and filed no workers compensation claim. Dr. Rubinowicz indicated claimant's right upper extremity condition was progressive in nature. Claimant alleged a date of injury in her Application for Hearing in Docket No. 1,062,753 as, "Repetitive trauma

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[4] K.S.A. 2012 Supp. 44-501b(c).

[5] K.S.A. 2012 Supp. 44-508(h).

[6] P.H. Trans. (Jan. 2, 2013), Resp. Ex. C.

through 8/10/11,"[7] which implies claimant believed her repetitive bilateral upper extremity injuries began earlier and progressively worsened. Claimant's bilateral upper extremity injuries became symptomatic in 2009, then the symptoms subsided, but again worsened in 2010. After seeing Dr. Rubinowicz, claimant did not seek medical treatment for her upper extremities until her accident on August 10, 2011. This Board Member finds claimant sustained one series of repetitive bilateral upper extremity injuries while working for respondent, not two separate series of injuries.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

CONCLUSION

1. ALJ Hursh's findings in Docket No. 1,062,754 are affirmed.

2. In Docket No. 1,062,753, claimant sustained bilateral upper extremity injuries by repetitive trauma on November 13, 2012, that arose out of and in the course of her employment. Claimant's work activities were the prevailing factor causing her injuries and current need for medical treatment.

WHEREFORE, the undersigned Board Member affirms that part of the January 2, 2013, preliminary hearing Order entered by ALJ Hursh regarding Docket No. 1,062,754. In Docket No. 1,062,753, the undersigned Board Member affirms ALJ Hursh's finding that claimant's date of injury by repetitive trauma is November 13, 2012. The undersigned Board Member reverses ALJ Hursh's determination that claimant failed to prove she sustained bilateral upper extremity injuries by repetitive trauma arising out of and in the course of her employment with respondent. This matter is remanded to the Administrative Law Judge for further orders consistent herewith.

IT IS SO ORDERED.

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[7] Application for Hearing, Docket No. 1,062,753 (filed Oct. 12, 2012).

[8] K.S.A. 2012 Supp. 44-534a.

[9] K.S.A. 2012 Supp. 44-555c(k).

Dated this ____ day of April, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge